No. 95-1011

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

FRANK MCDANIELS,

Petitioner,

v.

JAMES R. FLICK; JOHN M. FITZPATRICK; FRANK C. HESS, JR.; JAMES P. GAFFNEY; JOSEPH W. GATTINELLA; NANCY J. GILOLEY; DEE M. GRANT; SHARON KREITZBERG; JAMES J. MCCANN; BARBARA W. MOSS; ALBERT T. OLENZAK; LUTHER H. SMITH; ROBERT E. WELSH; DELAWARE COUNTY COMMUNITY COLLEGE,

DELAWARE COUNTY COMMUNITY COLLEGE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether a public employee who has received notice of sexual harassment charges against him, an explanation of the evidence against him, and an opportunity to present his side of the story prior to termination, and to whom the opportunity for full post-termination review is available, has been afforded pretermination procedures that comport with due process.

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COUNTER-STATEMENT OF THE CASE

This case presents a narrow issue regarding the pretermination procedural due process rights of a public employee. In August 1990, Delaware County Community College (the "College"), a public community college, issued a formal letter of reprimand to a tenured professor, Frank McDaniels, for his repeated violations of the College's sexual harassment policy. The letter of reprimand advised Mr. McDaniels that any further transgression would "result in serious disciplinary action including termination of employment."

In November 1991, yet another student complained that Mr. McDaniels had sexually harassed him on several occasions. The student, Mr. Federici, brought his complaint to James E. Bryan, the College's Director of Personnel Services. Mr. Bryan was familiar with Mr. McDaniels' history of sexual harassment. Mr. Federici described graphic incidents of sexual harassment, including both unwanted physical contact and sexually explicit and offensive remarks. Mr. Bryan composed a written summary of Mr. Federici's allegations, which Mr. Federici reviewed and signed. Mr. Bryan also investigated Mr. Federici's complaints independently. Following these events, Mr. Bryan scheduled a pretermination meeting for Mr. McDaniels. The circumstances surrounding that meeting form the crux of this case.

Mr. Bryan left a telephone message for Mr. McDaniels during the morning of November 27, 1991, requesting Mr. McDaniels to come to a meeting later that afternoon. Thomas McNicholas, Dean of Arts, Sciences and Commerce at the College, also was present at the meeting. The

first thing Mr. Bryan told Mr. McDaniels at the meeting was that "there had been serious charges of misconduct by a student and he was going to recommend [Mr. McDaniels'] termination." Mr. McDaniels understood from the beginning of the meeting that Mr. Bryan believed that Mr. McDaniels had violated the College's sexual harassment policy and that Mr. Bryan intended to recommend Mr. McDaniels' termination to the College's Board of Trustees. Mr. Bryan identified Mr. Federici as the complaining student during the meeting.

At the pretermination meeting, Mr. Bryan related specific details of Mr. Federici's allegations against Mr. McDaniels, including the allegations of physical contact and remarks concerning "tough love." Mr. Bryan expressly reminded Mr. McDaniels about the prior reprimand for violating the sexual harassment policy, showed him the signed warning letter, and informed him of his options for review of the termination decision under the College's collective bargaining agreement, the College's sexual harassment policy, and the Pennsylvania Local Agency Law. The meeting lasted approximately forty-five minutes.

Mr. McDaniels became upset upon learning that Mr. Federici was the complaining student, claiming that Mr. Federici was seeking retribution for an unsatisfactory grade Mr. McDaniels had given him. At some point during the meeting, Mr. McDaniels left the room to collect himself and then returned. Upon returning, Mr. McDaniels discussed the allegations raised by Mr. Bryan. Mr. McDaniels denied remembering that he had touched Mr. Federici, but admitted that he "could have." While he

admitted having discussed "tough love" with Mr. Federici, he denied harassing Mr. Federici. In his defense, he accused Mr. Federici of having "emotional problems," and urged Mr. Bryan and Dean McNicholas to discuss the allegations with Henry Jackson, an Assistant Dean at the College, who was Mr. McDaniels' supervisor and who was familiar with Mr. Federici's academic problems in Mr. McDaniels' course.

Following this pretermination meeting, and after further investigation by the College, Mr. Bryan wrote a letter to Mr. McDaniels, informing him that the College had completed its review of the matter and that Mr. Bryan had not altered his recommendation to terminate Mr. McDaniels' employment for violation of the College's sexual harassment policy. On December 9, 1991, Mr. Bryan again wrote to Mr. McDaniels, advising him that under the College's sexual harassment policy he had the right to request further review and investigation of the sexual harassment complaint by the College's President, Richard DeCosmo.

Mr. McDaniels took advantage of this additional opportunity to present his side of the story. On December 12, 1991, he wrote a letter to President DeCosmo, in which he denied the truth of the sexual harassment allegations and attempted to explain them, and requested further review and investigation. Mr. McDaniels stated in his letter that he had prepared a detailed chronology of all his contacts with Mr. Federici, which he was withholding "on advice of attorney." After receiving this letter, President DeCosmo met with Mr. Bryan regarding the substance of the allegations and the investigation. President DeCosmo then wrote to Mr. McDaniels on December

18, 1991, informing him that "I am satisfied that there has been a thorough review of the matter in question. I do not believe further review is necessary. The recommendation to terminate your employment for violation of the College's sexual harassment policy will be presented to the Board of Trustees at their meeting on December 18."

The recommendation to terminate Mr. McDaniels' employment was made to the Board on that date. The Board was informed that: (1) Mr. McDaniels had been charged with violating the College's sexual harassment policy by sexually harassing students in both 1990 and 1991; (2) the charges had been thoroughly investigated; (3) a pretermination hearing had been held; (4) Mr. McDaniels had been given an opportunity to respond; and (5) the College administrators still believed that Mr. McDaniels' employment should be terminated. Based on all this information, and after asking several questions of Mr. Bryan, Dean McNicholas, President DeCosmo, and the College's attorney, the Board voted unanimously to terminate Mr. McDaniels' employment at the College. Mr. McDaniels was informed of this action by letter dated December 20, 1991. Mr. McDaniels thereafter chose not to pursue his post-termination remedies, which included review under the College's collective bargaining agreement, the College's sexual harassment policy, and the Pennsylvania Local Agency Law.

Instead, Mr. McDaniels filed an action against the College and the individual members of the College's Board of Trustees in federal district court under 42 U.S.C. § 1983, alleging that the College's pretermination meeting violated his procedural due process rights under the United States Constitution. The district court granted Mr.

McDaniels' summary judgment motion as to liability and a jury trial commenced on damages. At the start of the trial, the district court dismissed the individual defendants and, after hearing Mr. McDaniels' testimony, reversed its grant of summary judgment on liability. The district court then declared a mistrial and scheduled a new trial on both liability and damages.

The second trial was divided into three phases. In the first phase, concerning liability, the jury returned a verdict that: (1) the College adequately notified Mr. McDaniels that the meeting held between himself and College officials on November 27, 1991, was a pretermination hearing based on sexual harassment charges brought by a student; (2) at the pretermination hearing, the College adequately informed Mr. McDaniels of the substance of the case against him; and (3) Mr. McDaniels was not given a meaningful opportunity to respond to the charges of sexual harassment. In the second phase of the trial, the jury determined that Mr. McDaniels would not have been terminated had he been given an adequate opportunity to respond and the district court then ordered that Mr. McDaniels be reinstated with back pay. In the third phase of the trial, the jury determined that Mr. McDaniels was not entitled to non-economic damages. The district court thereafter denied both parties' post-trial motions. Both parties appealed.

On appeal, the United States Court of Appeals for the Third Circuit reversed the district court's order denying the College's post-trial motion for judgment as a matter of law and affirmed the district court's order dismissing the individual Board members. The court of appeals began its analysis with the seminal case with respect to

the pretermination procedural rights of public employees, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985), in which this Court held that prior to termination, a tenured public employee is entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."

The court of appeals expressly rejected Mr. McDaniels' argument that he was entitled to more pretermination process than the public employees in *Loudermill* because he was a tenured professor who had been teaching at the College for more than twenty years and because " '[t]enure is the pillar upon which academic freedom rests.' " A. 26 (quoting McDaniels' Third Circuit Brief at 34).[1] The court saw no reason why the facts of Mr. McDaniels' tenure or length of employ would entitle him to heightened process. A. 25-26. Moreover, the court held that Mr. McDaniels' status as a college professor *qua* college professor did not entitle him to more protection because there was no allegation that the College had discharged Mr. McDaniels for his exercise of any First Amendment or other right involving academic freedom. Rather, he had been discharged for sexual harassment of students. Accordingly, the court held that "only the *Loudermill* pretermination requirements were required here." A. 28.

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[1] References to the Appendix in this Court are to "A." The court of appeals' opinion was lengthy and thorough. We focus here on those aspects of the opinion that are relevant to the issues raised in Mr. McDaniels' petition.

Applying the *Loudermill* standard to the facts of this case, the court of appeals held that as a matter of law, "in light of the undisputed evidence regarding the timing of the relevant events, the jury's conclusion that [Mr. McDaniels] was not given a meaningful opportunity to respond and tell his side of the case cannot stand." A. 29-30. The court found compelling the undisputed facts that Mr. McDaniels did, in fact, respond at the November 27 pretermination hearing; that he had the opportunity further to respond between November 27 and his termination on December 18; and that he did, in fact, so further respond. A. 30-31.

The court further rejected Mr. McDaniels' argument that the district court erred in refusing to allow him to show at trial that the pretermination procedure afforded him was a "sham." The court reasoned that because there are two stages in the termination process at which procedural protections attach – pretermination and post-termination – and because, under this Court's decision in *Loudermill*, the pretermination hearing is meant only as "an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action," *Loudermill*, 470 U.S. at 545-46, a public employee is not entitled to an impartial decisionmaker at the pretermination stage as a matter of constitutional right. A. 36-41. In addition, the court of appeals found "most persuasive" the application of *Parratt v. Taylor*, 451 U.S. 527 (1981), to claims that pretermination decisionmakers are biased. A. 41. According to the court, where, as here, the state "provides a neutral tribunal at the post-termination stage that can resolve

charges of improper motives," assurance of an impartial decisionmaker at the pretermination stage as a matter of constitutional right would be unduly cumbersome and unnecessary. A. 43. In view of its holding that the College did not violate Mr. McDaniels' procedural due process rights, the court of appeals affirmed the district court's dismissal of the individual defendants and did not reach the issue of the district court's denial of Mr. McDaniels' motion for a new trial on non-economic damages.

The dissenting judge would have held that Mr. McDaniels was not provided constitutionally adequate notice of the November 27 pretermination meeting and, accordingly, that he did not have an adequate opportunity to respond and the College's pretermination procedure violated due process. A. 46-50.

ARGUMENT

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI.

Mr. McDaniels' petition essentially asks this Court to expand dramatically the pretermination procedural due process rights of public employees that it established over a decade ago in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). What Mr. McDaniels seeks would completely eviscerate *Loudermill* itself.

Rule 10 of the Supreme Court Rules sets forth the considerations indicating the character of the "special and important reasons" that support this Court's grant of a petition for a writ of certiorari. As relevant here, those

reasons include when a United States court of appeals has "rendered a decision in conflict with the decision of another United States court of appeals on the same matter;" or "decided an important question of federal law which has not been, but should be, settled by this Court;" or "decided a federal question in a way that conflicts with applicable decisions of this Court." But Mr. McDaniels' petition presents absolutely no reason – much less a special or important reason – why this Court should grant it.

The court of appeals' decision concerns a question of federal law that was settled by this Court in *Loudermill*, in which the Court set forth the test governing the pretermination procedural due process rights of public employees. The *Loudermill* test has been uniformly applied since then and its effectiveness has been well-proven over time.

Far from showing that the court of appeals' decision conflicts with any decision of this Court or any other court, the petition essentially demonstrates only Mr. McDaniels' dissatisfaction with the application of established precedent to the facts of his case and his desire that the law was something other than it so clearly is. Of course, that a particular litigant may not like the result in a particular case is hardly a reason for granting a petition for a writ of certiorari, especially where, as here, that result accords with both the precedent of this Court and the decisions of other courts of appeals. This Court

should reject Mr. McDaniels' argument that he was entitled to far more pretermination protections than this Court ever contemplated in *Loudermill* (or that courts applying *Loudermill* have extended) – protections that would fundamentally undermine, if not directly overrule, *Loudermill* itself.

I. THE ISSUES PRESENTED BY THE PETITION WERE SETTLED OVER A DECADE AGO BY THIS COURT IN *CLEVELAND BOARD OF EDUCATION V. LOUDERMILL*.

This Court established the contours of a public employee's right to a pretermination hearing in the seminal case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, the State of Ohio dismissed a security guard for dishonesty in filling out his job application. The employee filed an action in federal district court alleging that the Ohio statute, which provided that state employees could obtain administrative review only after the discharge occurred, was unconstitutional because it did not provide the employee an opportunity to respond to the charges against him prior to removal. *Loudermill*, 470 U.S. at 536.

The Supreme Court held that under the Fourteenth Amendment, a public employee with a property interest in his or her job is entitled to "some form of pretermination hearing." *Loudermill*, 470 U.S. at 542. The Court described the elements of "some form of pretermination hearing" as follows: "oral or written notice of the charges against [the employee], an explanation of the employer's evidence, and an opportunity to present [the employee's]

side of the story." *Id.* at 546. As this Court explained, "all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by [state law]." *Id.* at 547-48. In the Court's view, "[t]o require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.*

Balancing the interest of a public employee in retaining his employment with the competing governmental interest in the expeditious removal of unsatisfactory employees, the avoidance of administrative burdens, and the risk of erroneous termination, the Court emphasized that the pretermination hearing may be informal, especially if the state provides the employee with the right to a full evidentiary hearing after termination. As the Court explained, "the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 545-46.

This Court's decision in *Loudermill* has been followed consistently and applied uniformly by the courts of appeals. *See, e.g., Collins v. Marina-Martinez,* 894 F.2d 474 (1st Cir. 1990); *Acosta-Spulveda v. Hernandez-Percell,* 889 F.2d 9 (1st Cir. 1989); *Strong v. Board of Educ.,* 902 F.2d 208 (2d Cir.), *cert. denied,* 498 U.S. 897 (1990); *Garraghty v. Jordan,* 830 F.2d 1295 (4th Cir. 1987); *Dorlak v. Bobear,* 814 F.2d 1055 (5th Cir. 1987); *Blank v. Peers,* 1993 U.S. App. LEXIS 8038 (6th Cir. April 7, 1993); *Guarino v. Brookfield*

Twp. Trustees, 980 F.2d 399 (6th Cir. 1992); *Jones v. City of Gary*, 57 F.3d 1435 (7th Cir. 1995); *Cliff v. Board of School Comm'rs*, 42 F.3d 403 (7th Cir. 1994); *Simons v. City of Grand Forks*, 985 F.2d 981 (8th Cir. 1993); *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469 (9th Cir. 1993); *Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555 (10th Cir. 1992); *Derstein v. Kansas*, 915 F.2d 1410 (10th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991); *Narey v. Dean*, 32 F.3d 1521 (11th Cir. 1994); *Hatcher v. Board of Public Educ.*, 809 F.2d 1546 (11th Cir. 1987). In fact, the College has found no case involving the pretermination procedural rights of public employees that has *not* applied the *Loudermill* standard. Yet, essentially, that is what Mr. McDaniels seeks.

As we next discuss, this petition should be denied because the court of appeals' decision is entirely consistent with *Loudermill* and its progeny. First, the court of appeals correctly applied *Loudermill* to the facts of this case. And second, Mr. McDaniels' attempts to convince this Court that he is entitled to more pretermination process than *Loudermill* provides present no special or important reasons for granting the writ and should be rejected.

II. THE COURT OF APPEALS' DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *LOUDERMILL*.

As it was required to do under *Loudermill*, the court of appeals carefully weighed the competing interests presented in the case: on the one hand, Mr. McDaniels' property interest in his continued employment and his interest in preserving his reputation and, on the other

hand, the College's interest in its reputation and in protecting its students by terminating an employee who repeatedly was accused of sexually harassing his students. Essentially, Mr. McDaniels complains about how the court of appeals applied *Loudermill* to the facts of his case. However, noting that the jury had found that Mr. McDaniels had been given both "adequate notice and a sufficient explanation of the charges against him," (A. 32), the court reasoned (and the dissenting judge agreed) that the findings of notice were so intertwined with the opportunity to respond that the jury's conclusion that Mr. McDaniels had not had an adequate opportunity to respond was logically inconsistent. A. 32.

The court of appeals also emphasized that, in addition to the meaningful opportunity to respond provided at the pretermination hearing itself (at which Mr. McDaniels did, in fact, respond), the College also provided Mr. McDaniels with an additional period of nearly two weeks to respond further – during which Mr. McDaniels again responded. A. 33-34. According to the court of appeals, "the elapse of time between the November 27 and the December 18 meeting requires that judgment as a matter of law be entered in favor of the college." A. 34. The court also found persuasive the decision in *Derstein v. Kansas*, 915 F.2d 1410 (10th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991), in which on remarkably similar facts the United States Court of Appeals for the Tenth Circuit found no procedural due process violation. Considering all these factors, the court of appeals correctly determined that Mr. McDaniels received all the pretermination procedural process he was due under *Loudermill*.

Moreover, in concluding that the evidence adduced at trial was insufficient as a matter of law to support the jury's finding that the College did not afford Mr. McDaniels a meaningful opportunity to tell his story, the court of appeals viewed the evidence in the light most favorable to Mr. McDaniels. It did not "usurp the jury function," as Mr. McDaniels asserts. McDaniels' Petition at 22. It merely applied the law as set forth in *Loudermill* to the facts as found by the jury, giving Mr. McDaniels the benefit of every doubt. *See* A. 8 & n.2. A district court does not "usurp the jury function" when it grants a post-trial motion for judgment as a matter of law and a court of appeals does not "usurp the jury function" when it reverses a district court's denial of such a post-trial motion.

In sum, the court of appeals correctly applied the legal standard set forth in *Loudermill* to the facts of this case, and there is no reason to grant the petition.

III. PETITIONER IS NOT ENTITLED TO MORE PRE-TERMINATION PROCESS THAN *LOUDERMILL* PROVIDES.

In derogation of *Loudermill*, Mr. McDaniels asserts that his procedural due process rights were violated in three respects: the "insulation" of the College's Board from the specifics of the case (see McDaniels' Petition at 14-16); the failure to give him, a tenured college professor, *more* process than the Supreme Court held in *Loudermill* is due to public employees prior to termination (see *id.* at 16-20); and the rejection of his "sham" pretermination hearing theory (see *id.* at 20-21). Essentially, Mr.

McDaniels seeks to engraft additional procedural requirements onto the *Loudermill* standard – requirements that are at odds with *Loudermill* itself.

Mr. McDaniels' arguments not only are devoid of merit, but also do not present any issue worthy of this Court's review. In fact, the import of the additional pretermination procedural protections that Mr. McDaniels seeks would, in effect, overrule *Loudermill* by transforming what this Court held the pretermination hearing *should* be – "an initial check against mistaken decisions" – into what this Court held it should *not* be – a full-blown inquiry into the propriety of the discharge. *See Loudermill*, 470 U.S. at 545-46.

A. That The College's Board Of Trustees Was The Entity Formally To Terminate Mr. McDaniels Does Not Entitle Him To More Pretermination Process Than *Loudermill* Provides.

Mr. McDaniels asserts that "the Board terminated the Professor without any knowledge of the specifics of the charges against him or his side of the story" and argues that "[t]he complete insulation of the decision-making board from knowledge of the specifics of the charges or the professor's side of the story violates due process." McDaniels' Petition at 14.

While it is somewhat difficult to ascertain precisely what Mr. McDaniels would have had the Board know or do, as a factual matter Mr. McDaniels' assertion with regard to the role of the Board is, at best, misleading. The uncontroverted evidence at trial showed that the Board

was informed that: (1) Mr. McDaniels had been charged with violating the College's sexual harassment policy by sexually harassing students in both 1990 and 1991; (2) the charges had been thoroughly investigated; (3) a pretermination hearing had been held; (4) Mr. McDaniels had been given an opportunity to respond; and (5) the College administrators still believed that Mr. McDaniels' employment should be terminated. Based on all this information, and after asking several questions of Mr. Bryan, Dean McNicholas, President DeCosmo, and the College's attorney, the Board voted unanimously to terminate Mr. McDaniels' employment.

Moreover, as a legal matter, Mr. McDaniels' argument is devoid of merit. One need look no further than this Court's decision in *Loudermill* itself to understand why. As in this case, in *Loudermill* the defendant entity's board simply adopted – without any further investigation or independent knowledge or itself having heard the employee's side of the story – the recommendation of one of its administrators to terminate an employee. *Loudermill*, 470 U.S. at 535. Far from requiring that board members who technically effectuate the termination must personally investigate or have a personal understanding of the evidence, in *Loudermill* this Court held that due process is satisfied if prior to termination the employee has notice of the charges, an explanation of the evidence, and an opportunity to tell his or her side of the story. This Court expressly declined to require that an employer provide anything more because "to require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly

removing an unsatisfactory employee." *Loudermill*, 470 U.S. at 546.

Indeed, a constitutional requirement that college board members (or any other governing body of a public institution) have personal, independent knowledge of the evidence supporting a termination decision would have a profoundly deleterious effect on the administration of public institutions, to which delegation of responsibility is central. A college board cannot be expected – much less constitutionally required – to have personal, independent knowledge of the personnel decisions of the administrators to whom, of course, governing boards must entrust such decisions. Here, the Board legitimately relied on the recommendation of the College's administrators and, in fact, exceeded any duties it had by questioning the administrators and the College's counsel to make certain they had accorded Mr. McDaniels the pretermination procedures to which he was due.

The only decision of this Court that Mr. McDaniels cites, *Morgan v. United States*, 298 U.S. 468 (1938), is not at all instructive on the issues presented in this case. In *Morgan*, the hearing at issue was not a pretermination hearing prior to full post-termination procedures. Rather, it was a "full hearing" of a "quasi-judicial character" required to be held by the Secretary of Agriculture pursuant to statute. *Id.* at 479-481. In this context, where the ultimate decisionmaker acted essentially as a judge in an administrative proceeding that under the statute required "the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings," the Court required the final decisionmaker to consider the

facts in the first instance. *Id.* at 480. The hearing at issue in *Morgan* was precisely what this Court in *Loudermill* held a pretermination hearing should not be – a full-blown inquiry into the merits of an action. Based as it is on entirely different principles, *Morgan* has no applicability here.

The only court of appeals' decision on which Mr. McDaniels relies in support of his "personal understanding of the evidence" argument is *Bates v. Sponberg*, 547 F.2d 325 (6th Cir. 1976). However, *Bates* neither supports his position nor demonstrates a conflict between circuits. In *Bates*, the United States Court of Appeals for the Sixth Circuit held that a tenured faculty member was *not* denied procedural due process. *Id.* at 333. Although the *Bates* court discussed the "personal understanding" requirement urged by Mr. McDaniels, it did not find that issue dispositive. *Id.* at 332. Rather, it held that the "crux" of the procedural due process issue was "not whether the due process hearing to which [the professor] may have been entitled was held in the presence of the authority having final responsibility to determine his discharge, but instead whether the hearing accorded him was meaningful." *Id.* Significantly, the *Bates* court also noted that the ultimate decisionmaker could delegate its responsibility to review the evidence supporting the termination recommendation. *Id.* at 332-33.

Furthermore, even assuming *arguendo* that Mr. McDaniels' reading of *Bates* were accurate (which it is not), the decision is of questionable import because *Bates* pre-dated *Loudermill*. To the extent that *Bates* could be read to suggest that pretermination procedures for public

employees include some level of "personal understanding" by the ultimate decisionmaker, that requirement is no longer valid in light of *Loudermill*. In fact, the United States Court of Appeals for the Sixth Circuit itself, which had issued the opinions that *Loudermill* affirmed, thereafter applied *Loudermill* without reference to its holding in *Bates*. *See Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988) (*en banc*) (no requirement that city council, the ultimate decisionmaker, have personal understanding where pretermination hearing was held by immediate supervisor), *cert. denied*, 489 U.S. 1081 (1989).

In short, there simply is no authority supporting Mr. McDaniels' argument that procedural due process requires that he is entitled to a hearing before the College's Board of Trustees or that the Board independently investigate or have a personal understanding of the evidence. Neither this Court's decision in *Loudermill* nor any other case imposes such a cumbersome procedural protection prior to termination.

B. Mr. McDaniels' Status As A Tenured College Professor Does Not Entitle Him To More Pretermination Process Than *Loudermill* Provides.

Mr. McDaniels next attempts to enlarge this Court's decision in *Loudermill* by arguing that because he was a "twenty year veteran professor" with tenure and because of his resulting interest in academic freedom, he is entitled to more pretermination procedures than are other public employees. McDaniels' Petition at 16-20. The court of appeals rejected this argument, explaining that "[i]nasmuch as the college did not discharge McDaniels

in retaliation for his exercise of First Amendment rights, this case does not implicate free speech issues. . . . Rather, we are concerned with the minimum process due under the Constitution to protect property rights in public employment." A. 26. In addition, the court noted that "[i]n considering the interests of the college, we note that it, as much as a professor, has a great interest in preserving its reputation . . . [and] the college had adopted a policy of protecting its students from the types of behavior charged against McDaniels." A. 28.

As a threshold factual matter, the court of appeals correctly noted that neither the First Amendment nor academic freedom ever were issues in this case. To the contrary, as the court explained, Mr. McDaniels' theory was that the reason for his termination was pretextual because the College "pounced on Federici's complaint to get rid of a highly paid professor to save money" (A. 37), not that he was terminated in retaliation for exercising protected rights. Academic freedom is nothing but a red herring first advanced as an argument on appeal.

In addition, as a legal matter both this Court and the courts of appeals have recognized *Loudermill* as providing the controlling standard in cases such as this involving the pretermination due process rights of tenured college or university professors. In *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988), Mr. Tarkanian, like Mr. McDaniels, was a tenured professor. The Court noted that when a state university "decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment." *Id.* at 192 (citing *Loudermill*). The Court's notation that *Loudermill* would provide

the standard by which procedural due process for a tenured professor would be judged refutes Mr. McDaniels' argument that as a tenured professor he is entitled to more procedural safeguards than *Loudermill* provides.

The courts of appeals similarly have concluded that *Loudermill* amply protects tenured teachers and, accordingly, in cases such as this have applied *Loudermill* as the standard for pretermination procedural due process rights. *See, e.g., Cliff v. Board of School Comm'rs*, 42 F.3d 403 (7th Cir. 1994) (tenured high school teacher with 28 years of service); *Blank v. Peers*, 1993 U.S. App. LEXIS 8038 (6th Cir. April 7, 1993) (tenured university professor with 22 years of service); *Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555 (10th Cir. 1992) (tenured high school teacher); *Strong v. Board of Educ.*, 902 F.2d 208 (2d Cir. 1990) (tenured elementary school teacher with 10 years of service), *cert. denied*, 498 U.S. 897 (1990); *Collins v. Marina-Martinez*, 894 F.2d 474 (1st Cir. 1990) (tenured university professor); *Hatcher v. Board of Public Educ.*, 809 F.2d 1546 (11th Cir. 1987) (tenured teacher and principal with more than 25 years of service).

The cases upon which Mr. McDaniels relies to support his assertion that he is entitled to heightened pretermination process are inapposite. In *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), the plaintiff was a public employer, not a public employee, and the due process right at issue was an employer's right to discharge an employee, not an employee's right to a pretermination hearing. Accordingly, to the extent the specific procedures set forth in *Brock* differ from those in *Loudermill*,

that difference is dictated by the fact that completely different interests were at stake in each case.

In *Holley v. Seminole County School Dist.*, 755 F.2d 1492 (11th Cir. 1985), the United States Court of Appeals for the Eleventh Circuit held that the two-day adversary hearing afforded a tenured teacher prior to nonrenewal of his contract did *not* violate due process. *Id.* at 1497. Without even a citation to *Loudermill* (which had been decided only days before it issued its opinion), the court of appeals determined that the hearing fulfilled all the requirements of the state statute governing teacher dismissals. No such statute is even at issue in this case. Moreover, when that court revisited the issue of the procedures required prior to termination of a tenured teacher, it applied *Loudermill* without imposing any additional procedural due process requirements. *See Hatcher v. Board of Public Educ.*, 809 F.2d 1546 (11th Cir. 1987).

In short, neither reason nor authority supports Mr. McDaniels' argument that his status as a tenured college professor entitles him to more pretermination process than *Loudermill* provides.

C. Mr. McDaniels' Allegation Of A "Sham" Pretermination Hearing Does Not Entitle Him To More Pretermination Process Than *Loudermill* Provides.

Mr. McDaniels' arguments that *Loudermill* requires an impartial decisionmaker at the pretermination stage and that he should have been permitted to show that the pretermination hearing was a "sham," McDaniels' Petition at 20-21, are simply further unfounded attempts to

expand the procedural protections established in *Loudermill*. Accordingly, consistent with the decisions of other courts of appeals to have addressed the issue, the court of appeals flatly rejected this argument. A. 36-44. *See McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995); *Walker v. City of Berkeley*, 951 F.2d 182 (9th Cir. 1991); *Acosta-Spulveda v. Hernandez-Percell*, 889 F.2d 9 (1st Cir. 1989); *Duchesne*, 849 F.2d 1004 (6th Cir. 1988), *cert. denied*, 489 U.S. 1081 (1989); *Garraghty v. Jordan*, 830 F.2d 1295 (4th Cir. 1987); *Schaper v. City of Huntsville*, 813 F.2d 709 (5th Cir. 1987). Relying on *Loudermill*, these courts, like the court below, held that where an employer provides pretermination procedures pursuant to the dictates of *Loudermill*, due process does not also require an impartial pretermination decisionmaker because the procedural safeguard of an impartial post-termination decisionmaker satisfies due process. *See, e.g., McKinney*, 20 F.3d at 1562; *Walker*, 951 F.2d at 184.

This approach is the only one that does not eviscerate *Loudermill*. The impartial decisionmaker argument raised by Mr. McDaniels automatically would require more process than *Loudermill* has held is due to a public employee prior to termination. The mere raising of the argument would take the claim outside the realm of *Loudermill* and would require the sort of full evidentiary hearing that this Court specifically has held is inappropriate at the pretermination stage (as long as adequate post-termination procedures are available). Accordingly, to accept Mr. McDaniels' argument would render *Loudermill* meaningless.

Moreover, the court of appeals appropriately applied *Parratt v. Taylor*, 451 U.S. 527 (1981), to claims of bias at

the pretermination stage. In *Parratt*, a case arising in the prison context, this Court held that "random and unauthorized" acts by a state employee prior to a property deprivation do not give rise to a procedural due process violation as long as meaningful post-deprivation procedures are available. 451 U.S. at 539. The court of appeals reasoned that employment decisions often are made by the person's direct supervisor and thus particularly subject to charges of bias. Accordingly, "to require that the state ensure an impartial pretermination hearing in every instance would as a practical matter require that termination decisions initially be made by an outside party rather than the employer as charges of bias always could be made following an in-house discharge." A. 42. In view of the significant post-termination remedies available to Mr. McDaniels, including an action in state court under state law and options under his union contract, *Parratt* provides further support for the court of appeals' decision. Indeed, other courts of appeals also have applied *Parratt* to claims of biased decisionmakers at the pretermination stage. *See, e.g., McKinney*, 20 F.3d at 1562-63; *Schaper*, 813 F.2d at 714-16.[2]

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[2] Mr. McDaniels' final effort to gain review in this Court is virtually an afterthought. Nothing supports his bald assertion that the court of appeals so far departed from the accepted and usual interpretation of due process before a property deprivation as to call for this Court's power of supervision to safeguard these rights. See McDaniels' Petition at 24-25. To the contrary, the court of appeals properly concluded that Mr. McDaniels was provided with all the process he was due under *Loudermill*. Mr. McDaniels' disagreement with that conclusion notwithstanding, his petition does not present any issue that requires review by this Court.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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